

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-415

Filed: 17 February 2015

DEREK B. BAKER; BAKER & JAMES,
INC.; and B & J - TINGEN PLACE, LLC

v.

Lee County
No. 12 CVS 360

JAMES H. TUCKER, JR.

Appeal by defendant from judgment entered 26 November 2013 by Judge Douglas B. Sasser in Lee County Superior Court. Heard in the Court of Appeals 25 September 2014.

Bain Buzzard & McRae, LLP, by Edgar R. Bain, for plaintiffs-appellees.

Harrington, Gilleland, Winstead, Feindel & Lucas, LLP, by Eddie S. Winstead III, for defendant-appellant.

GEER, Judge.

Defendant James H. Tucker, Jr. appeals from an amended judgment entered pursuant to the motion of plaintiffs Derek B. Baker, Baker & James, Inc. ("the Corporation"), and B & J - Tingen Place, LLC ("the LLC") to amend a judgment ordering the judicial dissolution of the Corporation and the LLC of which plaintiff Baker and defendant were the sole owners. Plaintiffs' motion to amend alleged that the trial court failed to account for the Corporation's outstanding liabilities -- in particular, a debt owed to plaintiff Baker -- in calculating the companies' net worth and distributing funds following dissolution. The trial court agreed and amended the judgment to correct the calculation error. On appeal, defendant primarily argues

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that the trial court erred in amending the judgment because plaintiffs' motion did not set forth any of the grounds listed in Rule 59(a) of the Rules of Civil Procedure, as required for a valid motion to amend pursuant to Rule 59(e). N.C.R. Civ. P. 59(e). We disagree.

This Court has adopted a liberal interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial and has recognized that Rule 59(a) "provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court misapprehended or misapplied the applicable law." *Battle v. Sabates*, 198 N.C. App. 407, 416, 681 S.E.2d 788, 795 (2009). Here, plaintiffs' motion alleges that the trial court failed to adequately account for certain facts and, as a result, misapplied the law by failing to order a distribution of the Corporation and the LLC's assets in accordance with the parties' interests. The grounds set forth in plaintiffs' motion to amend have been held to be valid pursuant to Rules 59(a)(7), (8), and (9). Accordingly, we hold that plaintiffs' motion constituted a valid motion to amend the judgment pursuant to Rule 59(e) and affirm the amended judgment.

Facts

On 29 March 2012, plaintiffs filed a complaint against defendant alleging that plaintiff Baker and defendant had formed various business entities together, including the Corporation and the LLC, that developed and built residential properties, some of which defendant had sold and wrongfully appropriated the

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proceeds to himself. Plaintiffs brought claims for damages for the misappropriated funds, unfair and deceptive trade practices, and judicial termination of the Corporation and the LLC.

On 4 June 2012, defendant answered plaintiffs' complaint, moving to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted, denying many of the allegations regarding his wrongdoing, and counterclaiming against plaintiff Baker for breach of fiduciary duty and unjust enrichment.

On 24 May 2013, following a bench trial, the trial court entered a judgment in which it judicially dissolved the Corporation and the LLC, ordered that all funds held by the Corporation and the LLC be disbursed to plaintiff Baker, and taxed the costs of the action against defendant. On 4 June 2013, pursuant to Rules 59 and 60 of the Rules of Civil Procedure, plaintiffs filed a "MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR RELIEF FROM JUDGMENT," alleging as follows:

1. The Court has erred in its judgment in not providing for the payment of the outstanding liabilities of the companies.

(a) The decretal portion of the judgment does not correspond with the Court's findings of fact. In paragraph 9) C) of the Court's findings of fact, the parties stipulated that Derek Baker paid money to the corporation as a loan in the sum of \$85,588.37.

(b) In finding of fact 17) of the Court's judgment, the Court found that the net worth of the companies is \$102,157.86. In arriving at this figure in the calculation of net worth, the debt owed Derek Baker is shown as a liability in the sum of \$85,588.37, as is the interest on such

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loan in the sum of \$7,739.10, for a total outstanding liability of \$93,327.47 due Derek Baker.

(c) The Court has not, in the findings of fact or in the decretal portion of the judgment, provided for the repayment of the indebtedness due Derek Baker. There is no provision anywhere in the judgment for the repayment of the outstanding liability of the companies, which is the debt due Derek Baker. The Court's attention is called to the proposed judgment as prepared and submitted by the Plaintiff.

(d) In the Court's judgment, in order for Plaintiff Derek Baker to be repaid the funds loaned, it would be necessary for the Court to enter judgment against Defendant James H. Tucker, Jr. in favor of Derek Baker in a sum equal to one-half of the outstanding liabilities, to wit, \$46,663.73, which would be the amount owed by Defendant Tucker.

(e) An affidavit of Marc Gilfillan, CPA, is attached hereto with regard to the Court's findings and the error in the decretal portion of the judgment.

2. The Court should amend and correct its judgment, based on its own findings of fact, to provide for the payment of the outstanding liabilities of the companies, which would be judgment against Defendant James H. Tucker, Jr. for his one-half of the outstanding liabilities in the sum of \$46,663.73.

3. The Court has erred in its judgment in not placing the burden of proof on the Defendant on the issue of the \$100,000 salary paid to Plaintiff Baker. The Court states, in finding of fact 15), that the Court cannot find, from a preponderance of the evidence, that there was any agreement with regard to the payment of salary to Derek Baker. The Defendants [sic] raised the issue relating to salary in a counterclaim which was filed. The burden of proof relative to whether or not there was an agreement as to salary was on the Defendant. If the Court cannot find,

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by a preponderance of evidence, anything about the salary, then the Defendant should not receive any credit for the \$100,000.00 salary paid to Plaintiff Baker. In the Court's finding of fact, it appears that the Court had not correctly placed the burden of proof on the Defendant with regard to the matter of the salary, and the decretal portion of the judgment should not have given the Defendant any credit with regard to such salary.

4. If the Court can make no finding with regard to the salary, the Defendant has not carried the burden of proof and would not be entitled to a credit for the salary paid to Plaintiff. If, in the alternative, the Court considers that the Plaintiff received \$100,000.00 in salary to which he was not entitled, the Plaintiff is still entitled to recover for one-half of the companies' outstanding liabilities which are owed to him by virtue of loans made to the companies.

WHEREFORE, the Plaintiff respectfully prays that the Court hold a hearing with regard to this matter and proceed to alter or amend the judgment by virtue of the discrepancies between the findings of fact and the decretal portion of the judgment.

In sum, plaintiffs claimed that, based upon the findings of fact, the original order should have required defendant to pay the sum of \$46,663.73 to plaintiff Baker.

On 26 November 2013, the trial court filed an amended judgment in response to plaintiffs' motion and again judicially dissolved the Corporation and the LLC, but this time ordered defendant to pay plaintiff Baker \$46,663.73. Defendant timely appealed the amended judgment to this Court.

Discussion

On appeal, defendant argues that the trial court erred in entering an amended judgment because plaintiffs' motion did not properly state any basis for amendment

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of the judgment under Rule 59 or Rule 60 of the Rules of Civil Procedure. The trial court's amended judgment did not specify whether the court was acting pursuant to Rule 59 or 60.

We first consider whether plaintiffs' motion is valid pursuant to Rule 60. In a similar case in which a party requested that a judgment be amended pursuant to Rule 60, this Court stated:

Counsel for defendant and the trial court have misconceived the purposes of Rule 60(b)(6), N.C.R. Civ. Proc. Defendant seeks to *amend* the divorce judgment, *not* to be *relieved* of the judgment. N.C.G.S. 1A-1, Rule 59(e), governs amendments to judgments and requires that motions to alter or amend judgments be made within ten days after entry of the judgment. . . .

. . . .

Defendant's motion is to amend the judgment. By the very words of the court's order, "be and the same are hereby amended," the district court attempted to amend the divorce judgment. The motion was not properly made pursuant to Rule 60(b)(6) and the court erred in so considering it.

Coleman v. Arnette, 48 N.C. App. 733, 735, 269 S.E.2d 755, 756 (1980).

Here, as in *Coleman*, plaintiffs actually requested that the judgment be "alter[ed] or amend[ed.]" See *id.* The trial court then filed an "AMENDED JUDGMENT" and stated it was "allow[ing]" plaintiffs' motion "to alter or amend[.]" As plaintiffs sought and ultimately were allowed to amend the judgment, their motion

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was not properly a Rule 60, but rather a Rule 59(e) motion. We, therefore, turn to Rule 59(e).

"[O]ur standard of review under Rule 59(e) is abuse of discretion[.]" *Young v. Lica*, 156 N.C. App. 301, 304, 576 S.E.2d 421, 423 (2003). The grounds for a Rule 59(e) motion are found at Rule 59(a). In *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469-70, 645 S.E.2d 105, 108 (2007) (internal citations and quotation marks omitted), this Court explained that

[t]o qualify as a Rule 59 motion . . . the motion must state the grounds therefor and the grounds stated must be among those listed in Rule 59(a). We note that [w]hile failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure.

Rule 59(a) provides that reasons for altering or amending a judgment include:

- (1) Any irregularity by which any party was prevented from having a fair trial;
- (2) Misconduct of the jury or prevailing party;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
- (5) Manifest disregard by the jury of the instructions of the court;

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- (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
- (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
- (8) Error in law occurring at the trial and objected to by the party making the motion, or
- (9) Any other reason heretofore recognized as grounds for new trial.

N.C.R. Civ. P. 59(a).

Defendant, without citing any authority, asserts that because the judgment was entered after a bench trial, "without the benefit of a jury, a number of the grounds set forth in Rule 59(a) do not even apply." Our Courts have not adopted a narrow interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial. Although many of the grounds listed in Rule 59(a) address errors that involve a jury, Rule 59(a) also applies to bench trials. The rule specifically provides that "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." *Id.* In the context of a motion to amend an order pursuant to a bench trial, this Court has recognized that Rule 59(a) "provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court

misapprehended or misapplied the applicable law." *Batlle*, 198 N.C. App. at 416, 681 S.E.2d at 795.

In *Batlle*, an action for breach of a separation agreement, the defendant moved for sanctions pursuant to Rule 37 of the Rules of Civil Procedure based on the plaintiff's failure to timely respond to discovery requests. 198 N.C. App. at 409, 681 S.E.2d at 791. The trial court granted the defendant's motion and entered an order dismissing the plaintiff's amended complaint with prejudice and ordering the plaintiff to pay attorneys' fees. *Id.* at 411, 681 S.E.2d at 792. The trial court subsequently entered an order denying the plaintiff's Rule 59 motion to amend the order, and the plaintiff appealed both orders to this Court. 198 N.C. App. at 412, 681 S.E.2d at 793.

On appeal, this Court first addressed whether the plaintiff's motion stated a valid basis for obtaining relief under Rule 59(a). The plaintiff's motion cited Rules 59(a)(7) and (9) as grounds for the relief requested. In holding that the motion was valid, this Court reasoned:

In her motion, Plaintiff essentially challenged the trial court's balancing of the equities, argued that Defendant was not prejudiced by her delay in providing discovery, and claimed that "a lesser sanction would have been appropriate in this matter." At an absolute minimum, this argument would, if valid, provide a recognized basis for challenging the validity of an order dismissing a complaint as a sanction for failing to provide discovery, since trial judges are required to give consideration to lesser sanctions before acting in that fashion. Thus, even if the remainder of Plaintiff's motion constituted nothing more than a mere rearguing of information that had been previously presented to the trial court, her challenge to the

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sufficiency of the trial court's consideration of lesser sanctions constitutes a valid basis for granting a motion to alter or amend a judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e), under N.C. Gen. Stat. § 1A-1, Rules 59(a)(7) and (9).

Battle, 198 N.C. App. at 417-18, 681 S.E.2d at 796 (internal citation and footnote omitted). Thus, in concluding that the plaintiff's motion stated valid grounds under Rule 59(a)(7) despite the absence of a jury verdict, the Court necessarily read Rule 59(a)(7) liberally and construed the trial court's disposition and ruling on the Rule 37 motion for sanctions as the "verdict."

Defendant next argues that plaintiffs' motion cannot be considered a Rule 59(a)(8) motion because plaintiffs failed to show that they objected to the alleged error of law at trial. This Court, however, has also declined to strictly construe Rule 59(a)(8) when applied to an order entered after a bench trial. In *Elrod v. Elrod*, 125 N.C. App. 407, 408, 481 S.E.2d 108, 109 (1997), a custody action, the defendant appealed the denial of her motion to amend an order requiring the defendant to enroll her children in public school. This Court held that the defendant's motion was a proper motion pursuant to Rule 59(a)(8) because it "was based on specifically enumerated errors of law." 125 N.C. App. at 410, 481 S.E.2d at 110. Significantly, the Court did not adopt a strict reading of Rule 59(a)(8), and recognized that "[a]lthough [defendant] had not prior to the filing of the motion entered any objection to the Order, because the motion was timely filed and because the issues raised in the motion relate to matters in the Order (as opposed to errors allegedly occurring

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during a trial), it is properly considered a Rule 59(e) request to modify the [order] because of errors of law." 125 N.C. App. at 410, 481 S.E.2d at 110.

In this case, the trial court ordered the judicial dissolution of the Corporation and the LLC "pursuant to the provisions of Chapter 55 of the North Carolina General Statutes." Pursuant to N.C. Gen. Stat. § 55-14-33(b) (2013), "[a]fter entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with G.S. 55-14-05" N.C. Gen. Stat. § 55-14-05(a)(3) and (4) (2013), in turn, provide that "[d]ischarging or making provision for discharging its liabilities" and "[d]istributing its remaining property among its shareholders according to their interests" are necessary acts to winding up a dissolved corporation's affairs.

In plaintiffs' motion to amend, plaintiffs allege that, despite having made a finding that plaintiff Baker had loaned the Corporation \$85,588.37, the trial court failed to account for that liability in calculating how much money each party is owed after dissolution. Thus, by failing to account for the Corporation's liabilities and incorrectly calculating the total net worth of the companies, the trial court acted contrary to N.C. Gen. Stat. § 55-14-05.

In other words, the trial court "misapprehended the relevant facts or . . . misapplied the applicable law" -- grounds that this court has held to be valid grounds for relief pursuant to Rules 59(a)(7) and (9). *Batlle*, 198 N.C. App. at 416, 681 S.E.2d at 795. Furthermore, under *Elrod*, the grounds stated in plaintiffs' motion could also

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be considered a valid ground for amendment pursuant to Rule 59(a)(8), despite the lack of an objection raised at trial, because it concerns an error of law arising for the first time in the order. *See also Battle*, 198 N.C. App. at 417 n.3, 681 S.E.2d at 796 n.3 (noting that the plaintiff's challenge to the sufficiency of the trial court's consideration of lesser sanctions was an argument that could not have been advanced prior to the entry of the order "since [plaintiff] had no way to know the exact language that the trial court would employ in ruling on Defendant's request for sanctions prior to that time").

Accordingly, we hold that plaintiffs' motion constituted a valid motion to amend pursuant to Rules 59(a)(7), (8), and (9). Defendant has made no argument that the trial court abused its discretion in granting the motion. We, therefore, affirm the trial court's granting of plaintiffs' motion and the amended judgment.

Affirmed.

Chief Judge McGEE and Judge STROUD concur.